

**City of Leawood
Board of Zoning Appeals Minutes
June 27, 2018 – 5:30 p.m.
Leawood City Hall Council Chambers
4800 Town Center Drive
Leawood, KS 66211**

CALL TO ORDER/ROLL CALL:

Chairman Clawson: I'd like to call to order the June 27, 2018 Board of Zoning Appeals Meeting. Could I have roll call, please?

MEMBERS PRESENT: Munson, Dunn, Dr. Peppes, Clawson, Hawk, Bussing, and Farrington

MEMBERS ABSENT: none

STAFF PRESENT: Thompson, Hall, Roberts

APPROVAL OF MINUTES: Approval of the minutes from the May 23, 2018 Board of Zoning Appeals meeting

A motion to approve the minutes from the Board of Zoning May 23, 2018 Board of Zoning Appeals meeting was made by Dunn; seconded by Munson. Motion carried with a unanimous vote of 5-0. For: Munson, Dunn, Hawk, Bussing, and Farrington.

Dr. Peppes joined the meeting

NEW BUSINESS:

Case 30-2018 – Jay Benjamin/Owner – Request for a fence height exception in accordance with the LDO, Section 16-4-9.4 in an R-1 District for property commonly known as 9316 Mohawk Lane.

Staff Report:

Wade Thompson made the following presentation:

Mr. Thompson: The applicant would like to construct a 5' tall wooden privacy fence along the rear property line. The fence is being requested to provide some privacy and block vehicular traffic. The home backs up to a parking lot for the Cure of Ars Catholic school.

Chairman Clawson: Does the board have questions for staff? Is the applicant here?

Applicant Presentation:

Jay and Madaline Benjamin, 9316 Mohawk Lane, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Benjamin: I have pictures of the proposed fence (*places on overhead*) It is 5' tall on the back. We're putting in a front gate where our current 4' fence is on the front part of the property. This would match what we would be adding there. Other neighbors along the Cure of Ars parking lot on the north and east sides have fences. We back up to the east side of the property. People can see into our back yard from the back parking lot. At night, there are cars parked there, sometimes even racing around the parking lot. I travel for work, and my wife is home alone during the week. We'd like something to give us some privacy and a little security as well as beautify the property. Lastly, in the summer, the weeds grow up. We just had them trimmed back and killed over the weekend and on Monday. Wade said part of an issue might be the space between the fences if we don't replace the current fence. We're proposing to put in a gate on the back part of the property so we can actually kill the weeds, should they grow back. Obviously, for beautifying purposes, the current fence hasn't been kept up with all that much. We moved into the property a year ago, and we're really just trying to clean up and make it a better place. Do you have any questions for me?

Mr. Munson: Does the chain link fence belong to the school?

Mr. Benjamin: Yes, sir.

Mr. Munson: And they don't maintain it?

Mr. Benjamin: No, sir. All the weeds on our side of the property, we've cut back, but initially, we talked with them about cutting down the fence and just replacing it, but I guess it would be a big process for them to replace the whole fence. We're now proposing to build a fence next to it.

Chairman Clawson: How close will you get?

Mr. Benjamin: I'd like to get as close as possible. I think it would be 6" to 1'.

Mr. Munson: Your proposed fence is inside this chain link?

Mr. Benjamin: Yes, sir.

Chairman Clawson: Are there any issues with the city, relative to that proposal?

Mr. Thompson: There are not as long as he can get back and maintain his portion of the property.

Chairman Clawson: Is their fence on the property line?

Mr. Benjamin: It is. I've met with the building council of Cure of Ars, and they have given their blessing.

Ms. Farrington: Can you show the picture of the north side with the wood fence and the chain link fence to see what their spacing is?

Mr. Benjamin: It is about 1' there, too. That is on the north side, and on the east side, two neighbors north of us both have wood fences. One of them, I think, is closer to 6"; the other is closer to 1' in spacing.

Mr. Munson: Are the fences in the photos 6' tall?

Mr. Benjamin: Yes, sir.

Mr. Munson: You want a 5' fence?

Mr. Benjamin: Yes, sir. I'll take what I can get.

Chairman Clawson: Are there other questions for the applicant? Thank you. Is there anyone here that wishes to speak for or against this application? Do I have a motion?

A motion to approve Case 30-2018 – Jay Benjamin/Owner – Request for a fence height exception in accordance with the LDO, Section 16-4-9.4 in an R-1 District for property commonly known as 9316 Mohawk Lane – was made by Munson; seconded by Hawk. Motion carried with a unanimous vote of 6-0. For: Munson, Dr. Peppes, Hawk, Farrington, Dunn, and Bussing.

Case 31-2018 – Dave & Naaron DeGreeff/Owners – Request for a variance to the front yard average setback for the placement of a covered entryway in accordance with the LDO, Section 16-2-6.3(D) in an R-1 District for property commonly known as 9526 Manor Road. **WITHDRAWN**

Case 32-2018 – John Peterson/Polsinelli; Lynne O'Connell Trust/Owner – Request for a variance to the maximum allowable grade change on a lot in accordance with the LDO, Section 16-2-6.3(G) in an R-1 District for property commonly known as 2615 W. 98th Street.

Staff Report:

Wade Thompson made the following presentation:

Mr. Thompson: The property owners have razed the original home that was constructed in the 1950s and have constructed a new home. The finished floor of the new home was constructed 2' higher than the previous home, due to the requirement for it to be 2' higher than the base flood elevation. The elevation was raised in excess of 4' for the construction of two patios with walls. The variance is needed to allow a grade change that exceeds what was on the approved plan.

Chairman Clawson: What was the grade change approved on the plan?

Mr. Thompson: They allowed a little more than 2', but when it was built, they exceeded that in the back portion where the two patios were constructed.

Mr. Munson: They couldn't tell it happened until it was done?

Mr. Thompson: It was not built as approved per the plan. We didn't know they exceeded it until they provided the new plan.

Ms. Farrington: There were no inspections done?

Mr. Thompson: There were, but whenever they called for the TCO, it was discovered that the back portion of the home was raised higher than what was approved.

Chairman Clawson: Are there other questions for staff?

Dr. Peppes: I've got a question about the size of the lot. The square footage of the house that's there is within the requirements?

Mr. Thompson: Yes; it met all the other requirements for square footage and all setbacks.

Ms. Farrington: When the original approved plan was done, was there a grading plan done by a civil engineer?

Mr. Thompson: There was, and it was approved at 2'.

Chairman Clawson: I'm reading your notes that say Public Works had suggested or requested a flood study to be conducted before any action was taken. Is this true?

Mr. Thompson: That is if there was any work to be done in the floodplain. They could build the home at the approved elevation without the flood study.

Chairman Clawson: But what they're proposing now is work within the flood zone.

Mr. Thompson: It is not in the flood zone. The portion that was in the flood zone has since been removed. Now, it's just going to be the patio immediately behind the home and the first wall.

Mr. Dunn: It says on the illustration that yellow is approved and blue is not approved. The area that was approved was for a patio, and the area that wasn't approved was for another patio?

Mr. Thompson: Correct.

Mr. Dunn: Was the other patio in the original design?

Mr. Thompson: It was not.

Mr. Dunn: Is this an air conditioner pad?

Mr. Thompson: One of them is an air conditioner pad, and it's another pad for a generator.

Mr. Dunn: Were both of those in the original plan?

Mr. Thompson: They were not.

Mr. Dunn: Is it fair to say that we're talking about elevation grades that are confined to the areas shown in blue?

Mr. Thompson: Yes, sir.

Ms. Farrington: There's an area that looks like a stone wall. Is it "as built" prior to or "as built" as it was constructed later?

Mr. Thompson: It was constructed later. The only portion that was approved was the round rocks in yellow. The blue line is what was constructed.

Ms. Farrington: The stone wall and the steps down are a result of probably the grading changes that occurred during construction, and then they were just added in, but they were not on the approved plan originally.

Mr. Thompson: Correct.

Chairman Clawson: On the Site Plan topic, it listed the base flood elevation as 871.

Mr. Thompson: Correct.

Chairman Clawson: It looks like these patios that are probably within the floodplain are somewhat higher than that.

Mr. Thompson: That is correct. In some places, it is up to 5'.

Chairman Clawson: In other words, there is construction in the floodplain?

Mr. Thompson: I'm sorry; no, not in the floodplain. The wall that was in the floodplain has been removed.

Ms. Farrington: The air conditioner pad and the generator pad were added later. Were they not on the approved plan, or were they on the approved plan in a different location?

Mr. Thompson: They were not on the approved plan at all.

Ms. Farrington: That's pretty typical to come with a house.

Mr. Thompson: Yes.

Chairman Clawson: Are there other questions for staff? Is the applicant here who wishes to speak?

Applicant Presentation:

John Petersen, Polsinelli Law Firm, 6201 College Blvd, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Polsinelli: Keith Hyman with Ambassador Construction is here. Mark Alpers with Landscape Architect Land RKC is here as well if there are questions for them. I want to say at the outset that Mr. and Mrs. O'Connell are not here. Mrs. O'Connell just successfully beat a very serious health challenge, and they had a long-planned celebratory trip out of the country. I said they needed to go celebrate. This is very confusing. I understand why we get confused with the floodplain and some other issues. I also will tell you that we don't typically see somebody lawyering up on BZA matters with someone that does land use and development. I have to tell you, this started in September, 2016. You know, taking a home in the City of Leawood and reinvesting can get complicated, particularly when that lot is on a creek. It went through iterations. I'm not standing in front of you saying that everything was done perfectly or well thought out or fully documented, but it got so balled up and confused that Mark, who happens to be the brother of one of my partners, raised his hands, "I'm really confused as to why we are causing so much consternation. Is there someone who can help us figure this out?" That is what we have attempted to do since May of this year. I want to point out that this matter before you tonight has nothing to do with floodplain, building in the floodplain, flooding. All those issues have been resolved. We were able to sit down with Mark and Glen and say, "Where are we here?" There were gabion baskets that were attempted to be replaced in the creek. Contractors said they needed to fill in some gaps. The city said, "We want you to do it just the way we want it done," which is exactly what resulted. The houses on this street are 50 years old, which led to this situation. The original intent of the O'Connells was to rehab the house. It couldn't be done. In fact, this house and probably most of the existing homes along that creek and maybe some other creeks are in a unique situation. It is a legal, nonconforming use. If they burn down 50% of the value, they couldn't rebuild those houses because of the very issue that originally started this from the city, rightly so. The grade is too low. The city said that the lot had to be brought up 2'. Other pieces then start to move around, but they raised the grade. The house is now built and occupied with a Temporary Certificate of Occupancy. The concept was to create a 2-tiered wall system with the home and the landscaping around it on the approved plan. To the left, surrounded by a half circle of red rose bushes, is the second 14'x14' patio. The original building plans didn't have it, but I would suggest to you that there is a door coming out of the house with a step that is on the plan. The idea is that it would be a rather unique situation in Leawood that people would walk out a door onto grass. Did we miss it? We did not draw the 14'x14' pad outside the door. I would ask for a bit of

judicial notice, so to speak, that there was probably a desire to have some sort of level, impervious surface there, very similar to the idea of no air conditioning pad on the plan despite the fact that every house in the City of Leawood or in new construction has one. I'm not saying we get a free pass here, but it was the common approach and common sense everybody was operating in. When we started out, the city looked at the landscape wall, and it was found to be in the floodplain, unbeknownst to the landscape contractor. Mark said he had an engineer that gave him a no-rise letter. He thought it was a no-rise letter that said it wouldn't cause any downstream flooding. A no-rise letter is a long process. I said it's not a no-rise letter and that the wall had to come out. The wall was removed. What we're here about tonight is the second wall. The wall itself does not require a permit. The wall itself does not require any kind of exception, deviation, or variance from the City of Leawood. That is not the issue. The issue is that when the house was approved, the foundation was set with the 2' rise. It was essentially at 877. The former house was at 875. The engineer drew some plans and feathered it out from the back of the house. He didn't know he was going to be held to a 2'; he was just feathering it out so a patio could be put in with a back yard that would gently slope back into the floodplain. The issue tonight is not the wall itself; is in the area from the house to the wall, which is about 14'x14'. There isn't 4' of extra fill all across there. At one point, there is 4'; at one point, there is 6"; at one point, there is 1'. What it does is allow us to set the patio in, gently grade it down to that wall, and then leave it to how God graded this thing out down to the creek. This is a personal opinion, but I don't know why we have to go through this because staff has the discretion to put the grades in pursuant to that. They said that we had a plan, and we were 1 1/2' feet over, so it had to come before the BZA. That is what we're here about tonight. We would like to have the ability to have the kitchen, have a patio off the kitchen, have the patio, have a nice decorative wall, and have it leveled out with a little extra fill. That is really the factual background. All issues about floodplain and building walls in the floodplain have been worked out.

We have five criteria. The first is Uniqueness of the Property. Staff's position is that the home backs up to a creek and recognizes considerable changes in elevation; however, there are several homes in the area with the same issue. I would respectfully submit that one-off is not the definition of Uniqueness. I think it is unique, and it is a unique situation, and you're probably going to have 10% unique situations in Leawood that back up to creeks with this new regulation that if you're going to do a major renovation or rebuild a house, you have to bring the grades up and start over. Then, we have to figure out how to have patios and a reasonable transition from a relatively flat surface. I would argue that it is unique. Of course, we have this situation by the action of the neighbor. Well, every one of these starts with an action by the neighbor. The issue is once they start, there are a lot of unique requirements they had to adhere to, to move forward. I would respectfully suggest we meet that.

Rights of Adjacent Property Owners: the reason that the city requires a 2' rise from day one is all centered around being sure that we have an elevation that is not too high but that is high enough that storm and sanitary systems work well. They determined that it was at 2'. Consequently, once that grading is done, you need to be sure that you're not doing surface runoff to your neighbors to the left and your neighbors to the right. In fact, we swale to our neighbors to the east. Staff came out on this decorative wall that is around the approved patio, and they said they thought we needed to feather and taper the

wall down a bit and work the swale just a bit more to make sure that any surface runoff would stay on our property. We modified that wall to do that. We have some letters of support and there are neighbors here. We've really tried to pay attention that there will not be any adverse impact to neighbors in the area.

Hardship means that strict application of the Leawood Development Ordinance would constitute unnecessary hardship on the property owner, represented in the application. Staff's position is that the strict application of the ordinance will affect the property owners' ability to construct two small patios and a minimal back yard. Well, that is what we are trying to do, but to not have to step onto grass and a rather steep grade coming out of a door that was always on the plan makes hardship relative. In terms of good design of a house, we think it is a hardship, particularly when you compare that back to the detriment to the public at large or the city or creating some precedent that others will try to stand on for more egregious situations. Staff suggests that the hardship has been created by us.

Public Safety and General Welfare will not be adversely affected. I'm confused by this. Quite honestly, there is a great staff that operates in good faith, but this is a little representative of why Mark and Lynn got confused. We solved the floodplain problems, and they come and say that Public Works is opposed to any grade change in the floodplain area. We just heard. We're not in the floodplain. We've corrected that. To offer that as a reason to oppose this variance is confusing. I've said it enough that we have corrected all of those issues. Regarding Spirit and Intent, I would say that we should watch our grades and not get structures looming way above or out of proportion with surrounding homes. Let's get the grade set to where our sanitary and storm systems have enough gravity drop to work appropriately. Spirit and Intent is to ensure that the grading does not adversely affect any property owners with any surface runoff. When it is all done, people can reinvest in the community, build nice homes, and have small gathering areas in their back yard with decent, safe grades, for them to access those outdoor spaces on property that they own. With that, we would ask for the requested variance. I can put this up here and try to walk you through it if it's important to you. I'd be happy to answer any questions, and we have our contractors here.

Mr. Hawk: One of the considerations was we originally didn't have the small patio on the plan. If it had been on the original plan, would it have affected the approval process?

Mr. Thompson: If the building official had approved it, yes, but the house was already given 2'. When they built the additional patio, it was raised another 2'. In some places, it is close to 4' taller than what was approved.

Mr. Petersen: That is a great point. The approved elevation by the city for the foundation of the house is 877'. The patio sits at 877'3". It is 3" below. It is not looming higher. We just took it down. It is 3" higher than what the foundation is. It's miniscule. When you're laying these out, you don't quite drill down. I would respectfully suggest that if this 14'x14' patio had been on the plan, we wouldn't be here. Hindsight is 20/20.

Ms. Farrington: When we're looking at the plan with all the colors of blue and yellow, the question is about the one patio to the left of the yellow. Is that correct?

Mr. Thompson: Correct.

Ms. Farrington: The as-built concrete air conditioner pad, the generator pad, and the wall below weren't built with the permit. They weren't on the approved plan. That is not what we're looking at tonight, correct?

Mr. Thompson: You are because you're basically looking at all the dirt behind. They can build that wall without the permit.

Ms. Farrington: The area of question, the grade change is just centered around that patio, correct?

Mr. Thompson: And what would be behind the wall because it was raised.

Ms. Farrington: Correct, so it would be greater than the 2' that was approved.

Mr. Thompson: Correct.

Ms. Farrington: I'd like to say the rendering you showed was beautiful. It shows the intent of what the design was; however, a rendering is usually deemed as representational, whereas a plan is definitive. If that intent was there, which it obviously was in the rendering, the patio should have been put on the plan that was given to the city and approved. Looking at that, the intent was there. It wasn't an afterthought. The process was not followed the way it is supposed to be, and that is something that the contractor should know and should have followed. Here we are after the fact, and you're trying to argue an additional 2', but it is 4' that was changed. When you look at the grading on the plan, it shows the existing grading and the additional 4' that have been adjusted for the patio.

Mr. Petersen: Not across the entire patio.

Ms. Farrington: It has. If you look at where the wall is, it also has been adjusted. It all has. The grade has changed 4' instead of the approved 2'. This is an as-built, after-the-fact issue. We're looking at what was approved, and then we're here today. That was done. You can't backtrack and undo what has already been done. However, the approval process wasn't properly followed.

Mr. Petersen: That is absolutely correct. I hope I recognized that. The situation occurred. What we are asking today is to not have to tear out a patio, not have a patio, and tear out all this fill. I would point out that the top of the wall sits at 875'. At 874' was the city-approved grade at that site. There are spots where it is 4'. It's a feathered design guideline. Again, I'm not arguing that it wasn't built to the direct adherence, but it was feathered across. There are spots where it is 4', spots where it is 2', spots where it is 1'. It is out of compliance; we understand. Looking back, in part, that's where deviations sometimes occur. They shouldn't have built the wall in the floodplain; we fixed it. It's

not dispositive, but if we had that drawn on the plan and assumed someone knew there would be a patio there, we wouldn't be here tonight. I think that really goes to the issue about what the harm would be to the public by granting this variance.

Ms. Farrington: I'd like to point out that the last photograph that was shown is not in our packet, and it is actually an as-build showing the grade changes versus what is proposed and what has been changed. You're showing 875' on the photo, and we don't have it in our packet.

Mr. Petersen: This is accurate. If you want us to confirm that, we can attempt to do that.

Mr. Hawk: If I remember correctly, he said there was a door that would open and go somewhere, which is probably outside, presumably a patio or something below it.

Mr. Petersen: The door goes from the kitchen to the patio.

Chairman Clawson: Was there a detailed drainage study done as part of this construction?

Mr. Petersen: The grades were set by staff, and then staff came back out and looked at how we graded around these walls. We did some adjustments there. The detailed drainage study was an issue that was raised when we were in the floodplain. Once we moved out of the floodplain, it was no longer a requirement.

Chairman Clawson: Associated with a grade range, many times, a hydraulic study is performed to make sure that flow around the building is not going to impact adjacent property owners.

Mr. Petersen: We did have an engineer that did the grading and the grading plan and the swale plan around the wall. Staff inspected it, suggested some modifications, and we implemented those modifications.

Chairman Clawson: Does that plan include these proposed changes?

Mr. Petersen: Those are as it sits today, and as it sits out there today is the swale on the east side that was reviewed and approved by staff.

Chairman Clawson: What about on the west side?

Mr. Petersen: I think it was looked at, and I don't know that any problem was identified on the west side in terms of the way it was graded out. There is no issue that we're aware of from staff or anyone else that we have any issue with our water that hits our ground leaving our site in an inappropriate fashion. The issue, rightly so, is that between the wall and the house, there is a bit more fill than what was on the plan that was done with the idea that the house would be set at a very specific site and we would feather it out. You're right; we can't correct what was done and what was feathered, but that is the basis

for our request for your consideration and your discretion within the confines of the criteria.

Mr. Munson: In order to build this second patio, what must be done or not done?

Mr. Petersen: It's built.

Mr. Munson: If you don't get this, would it have be taken up and rebuilt?

Mr. Petersen: We would have to tear it up, take out dirt, get it right at each point along the face of it to where the grade is exactly right. The wall can stay. There would be a wall and a steep grade change coming from the house. They would step into grass out of the door from the kitchen. I don't know exactly who would be served by all that, but not the homeowner for sure. That is not to diminish the fact that the absolute adherence to the procedure was not followed. We acknowledge that. We wish we could turn the clock back.

Chairman Clawson: On the colored plan, the wall is highlighted in blue. Is that part of our consideration tonight?

Mr. Thompson: Everything in blue would be under consideration.

Mr. Petersen: The blue is what is behind the wall.

Mr. Thompson: Correct.

Mr. Dunn: Wade, looking at Public Safety and General Welfare, I'm referring to what Mr. Petersen referred to. It says that Public Works is opposed to any grade change in the floodplain area unless a qualified flood study is submitted. I understand what that says, but what it doesn't tell me is if this grade change, in the opinion of staff, is going to cause issues with flooding for other properties.

Mr. Thompson: I think I will defer that to Dave Roberts, the project's engineer.

Mr. Roberts: Public Works has deferred to building codes and the community development for the upper wall and any grading around the house and fill that's outside of the floodplain. Any fill in the floodplain needs a qualified flood study done in order to substantiate no rise. Such a detailed flood study has not been received by Leawood Public Works. We just received a letter that was of the opinion of their engineer that there was no rise. That is not acceptable to us. That is where we've been opposed to the lower wall and fill, which I understand, has been removed.

Mr. Petersen: I will say that there is no proposal to do any fill in the floodplain.

Mr. Roberts: That is my understanding. There are more than just drainage issues with the grade change around the houses. Building Codes and Community Development oversee

that process. We just add in our part where it pertains to the drainage, per se, and to the floodplain.

Mr. Dunn: I'm trying to keep this simple for my simple mind. Given the change that they made that was not approved, are there concerns that this will cause flooding issues for properties surrounding it? The answer I'm hearing is that you don't know.

Mr. Roberts: Public Works requested the improvement of the east side drainage valley from between the houses to the rear. This reflects a policy that Public Works has put into place that occurred after the initial approval of this house but something we have found needed to deal with the case of the teardown/rebuild since it's substantial improvements where we need improved drainage to avoid negatively impacting the adjacent properties.

Mr. Petersen: We completed that work.

Mr. Dunn: Let me ask this as simply as I can. Staff has reviewed it as-built, correct?

Mr. Thompson: Yes.

Mr. Dunn: In that review, you've recommended changes that you know need to be made on the east swale to assure there is no negative impact on surrounding property. Is that correct?

Mr. Roberts: Public Works has requested the east side swale. We have not re-inspected that swale. They have not called us back out to re-inspect the grading on the lot. The pre-sod grading inspection is still an open item for Public Works for this lot.

Mr. Dunn: Wade, were there any changes Public Works made to the way it was built that have not been made by the property owners?

Mr. Thompson: As far as I know, no.

Chairman Clawson: The recommendations that Public Works made were based on what criteria?

Mr. Roberts: The initial house elevation was made on the basis of the Leawood Development Ordinance that requires the lowest floor elevation to be 2' above the base flood elevation. That was the basis of the original approval of lot. That had the effect of raising the house more than the separate planning building code requirement that the new house be within 1' of the original house. The flood elevation has the effect of adjusting that 1' rise to whatever is needed to meet the zoning requirement that is written in the code. That resulted in a greater building height of this house than the previous house that was there.

Chairman Clawson: I would like to point out that we've had cases in the past where nominal grade changes were requested, and we approved them. The result of that was

adjacent neighbors had mud and debris in their swimming pool after a big rain. We take these situations very seriously.

Mr. Petersen: The grading is done and needs to be inspected. We did exactly what the city asked us to do in terms of the swales around the side.

Chairman Clawson: Other questions? Thank you. Is anyone here who wishes to speak for or against this application?

Dave Baumgartner, 2609 W. 98th, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Baumgartner: I am next door. This is my daughter, Kathy. She is our agent and takes care of the old folks. I have a few things I'd like to suggest. First things first: the O'Connells are delightful people. I've met them. I support their efforts in most cases. You have wonderful people. Robert and David Ley have taken our case beautifully and cared for us as well as they possibly can. As for engineering, I trust them implicitly. I'd like to add I am not an engineer. The closest thing I come to engineering is knowing which way the water goes downhill. That's what we're here to discuss. I have a few things I'd like to show you from last night if I may. When this project began, we lost every bit of grass on the east side of our home all the way down to our back yard. We did this because the fall from the existing property at that time was about 12-15" above us for approximately 30' back toward us. The problem is that no way to take care of which way the water came could be worked out at that time. We couldn't expect anyone to have that happen, so we lost our English garden, and we lost about \$80-\$90 worth of roses and a variety of other things. We were told by the people from Land Art, the contractors, about a month ago that they were going to put in new swales for us because of the higher proximity of the land. We're the drain. The problem seems to be that the swales are there, but they're choked with dirt. There's no rock in them. Mark said there would be rock in as quickly as possible. There's the rest of this wretched fence that's left on that side sitting where the swale is. There are four small trees planted and a better swale above where the trees are planted. The result of that is this. I'm 77, and when I have to get down and scratch the dirt to grow grass, I do it because I love to do it. Again, this week, with my diagnosis, it means that this young lady and her husband are going to be eating in our kitchen anytime they want for a long time. Our problem is the swale is not there. The promises have not been kept. This has gone on for 2 ½ years. I want to see the O'Connells finish the project, and I'm terribly pleased to find that Mrs. O'Connell is in better health than she was. They're wonderful people. We love having them as neighbors. We are retired, and we are limited with the funds and the amount of money we can put into our property. We don't expect anyone else to pay our bills for us. We wouldn't have that anyway. But the point is as much as we'd like to, it's getting awful hard to be patient. We request that whatever you choose to do, you consider the neighbors, at least the ones east and just a little bit the folks to the west. They're nice people, too. Any questions? Thank you.

Kathy: I'd just say to take a look at the stormwater. That's my concern. When we have these bellywashers, what is it going to do to my parents' foundation and yard? That's my biggest concern. I'm not an engineer, but I know they can pay for an engineer to say that this is going to be okay. That's all I'd like to see them do.

Chairman Clawson: Thank you. Is there anyone else here in the audience that would like to speak for or against this application?

Mr. Petersen: Could I please respond? For that swale that we worked out the design with the city, we have tile and rock, but the city has a stop work order on us because of this process. We haven't been able to get it out there. If we get approved, we'll get the tile laid in. We'll get the rock. If your recommendation is subject to certification that it was placed in, it would be great. We're ready to get to work. We haven't been able to work because we have a stop work order. You're right that there are great neighbors. We have two letters on file in support of the project. I know Mark and Lynne are committed to being good neighbors. We've designed it. We want to get it built. I would also suggest even if we were 1' off, we still would be building this swale. The fact that we put a little more fill in here is not the reason we need the swale. It's really that the house was raised 2' at the request of the city. Thank you very much.

Chairman Clawson: As you know, there is no one else here who wishes to speak for or against this application. This is a variance request. We have to evaluate the five factors. In order to support a motion for approval, we must vote in the affirmative on all five factors. The first in Uniqueness.

Mr. Hawk: *Inaudible comments*

Chairman Clawson: There are other houses on the creek. We had one up the street that was the exact same situation on the west side of Belinder. There are houses around that have similar situations.

Mr. Dunn: I agree with Mel, simply because it's not just that it sits on a creek. It sits on a creek, and the floodplain has basically changed since the original house was built. You're starting off from the fact that you've got to deal with raising the elevation. That makes it unique. It's not unique to Leawood; I agree with you, Mr. Chairman, but I think it's unique enough to meet the criterion.

Uniqueness criterion satisfied with a unanimous vote of 6-0. For: Munson, Dr. Peppes, Hawk, Farrington, Dunn, and Bussing.

Chairman Clawson: Rights of Adjacent Property Owners.

Mr. Hawk: *Inaudible comments*

Ms. Farrington: There are some letters that show approval; however, we had one neighbor that had questions. I think that the questions show that a drainage study should

be done to see how it affects the neighboring lots. Unfortunately, it is after the fact, so I'm having a hard time feeling that the rights have been met because it was done out of order. It was not done properly. That should be done not for the flood zone but for the neighbors.

Chairman Clawson: The situation on the east by Mr. Baumgartner's house looks serious to me. I think that needs to be addressed. I think in a variance request, we can put whatever stipulation on it. We can require them to perform an engineering drainage study. Would that be in our purview?

Mr. Roberts: I'm not sure I understand what you're asking.

Ms. Farrington: We're looking at Rights of Adjacent Property Owners. We could deny it based on the fact that we feel it hasn't met that criterion, or we could approve it with the acknowledgement that they have to have a drainage study done that doesn't affect neighbors. If we deny it, they have to somehow submit it differently if they're still trying to get what work has been put in place approved.

Mr. Hawk: Maybe not only a drainage study but proof that this is something that has been addressed.

Mr. Petersen: We would welcome that condition. We would come in with a study on that swale and have staff sign off on it.

Ms. Farrington: I think what we're hearing tonight is staff has approved certain swales; however, the homeowner representation says there has been a work order stopping it, so they can't perform that. Having a study done by a certified engineer proves that what they are proposing has been approved and that what has been put in place will work.

Chairman Clawson: I'm guessing Public Works didn't sit down and design a swale; they probably said that they needed a swale. Somebody has to design it.

Mr. Petersen: They inspected it. I think this is a great idea. I think if we were privileged with your recommendation, we would bring a certified engineer in and make sure the swale was designed appropriately with the tile and the rocks. You can condition variances.

Ms. Farrington: I would go a step further and address not just the swale. We're talking about all the grade changes for these blue areas that were done after the approved plan. All of that should be in the study.

Mr. Petersen: We would accept that.

Chairman Clawson: We could also continue this case until they perform that analysis.

Mr. Petersen: If we can get the stop work done so we can get that engineering done and we know we are not going to have to tear it out, we'll get that engineer. It would be conditioned. We wouldn't be able to move forward. I think it would be a sign that we would commit the resources to get that done.

Mr. Dunn: Just so we're clear on the record, I would not consider approving this unless it were conditioned upon them agreeing to perform a proper drainage study and to do whatever is recommended by that drainage study to ensure there are no adverse impacts on neighbors' property.

Mr. Petersen: We're very confident we can square that up, so we accept that condition wholeheartedly.

Dr. Peppes: Logistically, what should we do?

Ms. Farrington: Is this going to be a continuance or something we vote on with conditions?

Chairman Clawson: I would think we should continue it.

Mr. Petersen: I promise you that we will not be able to leave that grade in place as it is if we don't satisfy the condition. It will allow us to do some non-related work. I know the neighbors. Let's get the job done. We have contractors who can't move forward even on the non-related things. I think you're protected because I will acknowledge for the record that our ability to leave that wall and those grades where they are, are squarely conditioned on an engineering study that we're not going to send any water offsite that exceeds city standards. That opinion will be based on our engineering study as accepted by your professional staff.

Mr. Munson: Are you ready to escrow some money to get this all done?

Mr. Petersen: The escrow will be to engage that engineer. We don't have a Certificate of Occupancy yet. If we can move through this, we're going to get this done and get this house buttoned up and make it look like a home and not the mud. We'd really like to move forward with this.

Mr. Hawk: *Inaudible comments.* When can you start the work?

Mr. Petersen: If we get through tonight, I'm going to sit with the assistant city attorney, and we are going to hopefully work a system where we can get our folks out there now that we have clear direction. It's been a bit of this department to that department. I just think this would really set us on our way to get it done. I know these gentlemen are committed to doing it. If Mark and Lynne were here, they would ask to let them get the equipment out of the back yard, get this put in, and not have to worry about the next storm event. That would be a very sound resolution that would also leave you with the protection that there we can't not do what we say we're going to do.

Ms. Farrington: I don't know if I feel comfortable approving something without having seen the study that hasn't been performed yet, either.

Chairman Clawson: I don't think we've ever done it before. I don't think we've ever approved a variance contingent on some action.

Mr. Thompson: We haven't gone through the other criteria. There are two other criteria that I don't think they meet. You may think otherwise.

Chairman Clawson: You're right. We're kind of stuck on Rights of Adjacent Property Owners. Let's go through our analysis. Other comments on Rights of Adjacent Property Owners?

Mr. Munson: It's up in the air at best. We don't know whether they're protected or not.

Mr. Dunn: We talked about an amendment to that conditional approval. Are you going to include that amendment in this vote?

Chairman Clawson: If we decide we're going to do that, we would probably do that as part of the motion.

Ms. Farrington: If you amend that and include that based on a study that's done, are we leaving that up to staff to review to see that it meets the criteria? That doesn't allow us to look at it again and determine that it meets the variance they're asking for, which is our job as a board. We can't really do that.

Mr. Dunn: The difficulty I have is if you ask me about what's in front of us and if the rights of adjacent property owners are protected, I would say no. I don't think they are. As I said, I wouldn't approve a motion to approve unless it was conditioned on their willingness to do the study and whatever was recommended.

Mr. Hawk: Can we defer the vote on Rights of Adjacent Property Owners until we go through the other criteria?

Chairman Clawson: We could. We'll come back to this one. Let's go on to Hardship.

Mr. Munson: Staff says it's self-imposed. It's created by them. That's staff's opinion.

Ms. Farrington: This is a hard one for me, too, because I feel like the steps were not properly followed, and had they been, there wouldn't be hardship. The hardship is the work is in place, and if this doesn't get approved, it has to be removed and regraded. That hardship is brought upon by the homeowner's team at this point.

Hardship criterion not satisfied but a vote of 2-4. For: Bussing and Hawk. Opposed: Munson, Dr. Peppes, Farrington, and Dunn.

Chairman Clawson: Public Safety and General Welfare. It appears that the comment staff made does not apply because it appears that nothing is in the floodplain.

Mr. Thompson: The wall and the increase has been removed out of the floodplain.

Public Safety and General Welfare criterion satisfied with a unanimous vote of 6-0. For: Munson, Dr. Peppes, Hawk, Farrington, Dunn, and Bussing.

Chairman Clawson: Spirit and Intent.

Mr. Dunn: It says it's to preserve the unique character of the neighborhood. What is the unique character of that particular neighborhood? Is it all houses of the size that are there now? What is it like over there now?

Mr. Thompson: Right now, it's a lot of smaller ranch-style homes. This one is quite a bit bigger and really doesn't fit the neighborhood.

Mr. Dunn: But it isn't the requested variance that takes it out of spirit and intent; it is the actual house that meets our own zoning criteria for building. Is that correct?

Mr. Thompson: Yes, but the house that was there was built quite a bit farther north. This house is larger and moved back, which shrinks the size of their rear yard.

Mr. Dunn: I get it; it's just that I think these criteria are what we apply to the requested variance and not the requested building. Is that right?

Mr. Thompson: Correct, but I think it all goes hand in hand when you build a larger home and move it back. They probably could have built this house farther forward where the previous house was, and they would have had more rear yard.

Chairman Clawson: Not without redesigning it.

Mr. Hawk: The city did accept the plan for the house.

Mr. Thompson: Yes, but I think it all plays in to shrinking the rear yard, and we are here for the rear yard.

Mr. Petersen: That has nothing to do with this application, Mr. Chairman. The size of the rear yard is part of the approved plan. I want to make a point here. You raised a very good point about protecting the neighborhood. We've lost because you didn't vote for the Hardship. What we're left to do is tear the wall out, regrade the lot to where they approved it, which is a pretty steep grade off the house. There is no requirement for a swale. The only requirement for the swale as part of the ordinance is because we have that wall. We're trying to work with our neighbors, create a safety net, spend money, and

get it engineered. It's not a threat. We'll just take the wall out, have a door that walks onto a piece of grass because we didn't catch it on the plan.

Ms. Farrington: It's a little bit out of line if you think about what you're saying.

Mr. Petersen: It's not out of line with reality.

Ms. Farrington: Go get a drainage study and resubmit it. You may not have to change anything.

Mr. Petersen: How does that change the hardship?

Ms. Farrington: You're creating your own when you say you're going to tear out a wall and everything when you haven't even had this study conducted.

Mr. Petersen: It's a hardship to take the wall out. I get it; if we can't meet your criteria.

Ms. Farrington: You wouldn't have if you had followed the guidelines and had an approved plan to begin with.

Mr. Petersen: Mr. Chairman, can I respectfully request that we take a continuance so we can get a study done and bring it back? I think maybe that is the logical thing to do here.

Chairman Clawson: I'm fine with that.

A motion to continue Case 32-2018 – John Petersen/Polsinelli; Lynne O'Connell Trust/Owner – Request for a variance to the maximum allowable grade change on a lot in accordance with the LDO, Section 16-2-6.3(G) in an R-1 District for property commonly known as 2615 W. 98th Street – was made by Dunn; seconded by Farrington. Motion carried with a unanimous vote of 6-0. For: Munson, Dr. Peppes, Hawk, Farrington, Dunn, and Bussing.

Mr. Petersen: I want to state for the record that there won't be any work now because we're on a stop work order. We can't put sod down. We can't do anything. I just don't want any more criticism of this citizen of Leawood or these contractors as we move forward. We'll do the best we can.

Chairman Clawson: Wade, is that true? Is it across the board on the property?

Mr. Thompson: Travis Torrez, the building official, can lift the stop work order. It is his order that is in place. He would have to do that; we can't do that.

Chairman Clawson: I see.

Case 33-2018 – Dave Finkle/Owner – Request for an exception to the required side yard setback for the placement of a deck in accordance with the LDO, Section 16-2-6.3(D) in an R-1 District for property commonly known as 4305 W. 125th Terrace.

Staff Report:

Wade Thompson made the following presentation:

Mr. Thompson: The applicant would like to replace the deck on the rear of the home that sits 10.12 feet from the west property line. The new deck, as shown on the plan, is in line with the existing structure and will not increase the encroachment of the structure.

Chairman Clawson: Questions for staff? Is the applicant here?

Applicant Presentation

David Finkle, 4305 W. 125th Terrace, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Finkle: I really hope this is not as complicated as the last one. Do you have any questions? We're basically trying to use the same footprint to replace our deck, and the ordinance changed from when the deck was built. We didn't meet the side setback requirement, so we're applying for the exception. We are greater than 10' from the sides, so I think we meet all the criteria. Do you have any questions?

Ms. Farrington: The picture shows that the stairs go outward.

Mr. Thompson: That was the old deck.

Ms. Farrington: The stair line on the new deck actually turns inward versus outward, so it doesn't encroach. It stays in the same building line, correct?

Mr. Thompson: Right.

Ms. Farrington: The original one had stairs that went out.

Mr. Thompson: Yes, ma'am.

Mr. Hawk: It appears to be a difference of 10.1'. is that right?

Mr. Thompson: Correct. Anything less than 15' and more than 10' has to have the exception.

Chairman Clawson: It meets the exception requirement because it is in line and doesn't encroach more than the existing.

Mr. Thompson: Yes, sir.

Mr. Hawk: I would like to suggest that staff have a little latitude if you're talking about 12/100 of a foot.

Mr. Thompson: I understand what you're saying, but it really needs to be 15' away. It is really over 4' that the encroachment will be. Even though the existing home is legal, nonconforming, it is still an exception for the 4'.

Chairman Clawson: Are there other questions? Thank you. Is there anyone here who wishes to speak for or against this application? Do we have a motion?

A motion to approve Case 33-2018 – Dave Finkle/Owner – Request for an exception to the required side yard setback for the placement of a deck in accordance with the LDO, Section 16-2-6.3(D) in an R-1 District for property commonly known as 4305 W. 125th Terrace – was made by Munson; seconded by Hawk. Motion carried with a unanimous vote of 6-0. For: Munson, Dr. Peppes, Hawk, Farrington, Dunn, and Bussing.

Case 34-2018 – Teneca Clark/Owner – Request for an exception to the required side yard setback in accordance with the LDO, Section 16-2-5.3(D) in an R-1 District for property commonly known as 9904 Sagamore Road.

Staff Report:

Wade Thompson made the following presentation:

Mr. Thompson: The applicant would like to add a master bath addition on the rear of the home. The original home was constructed 10.5' from the property line. The new addition will extend off the rear of the home 16' and be 10.7' from the property line.

Chairman Clawson: Are there questions for staff?

Mr. Munson: On the picture, is it in the red?

Mr. Thompson: Yes, sir.

Chairman Clawson: Other comments for staff? Is the applicant here?

Applicant Presentation

Wes Welch appeared before the Board of Zoning Appeals and made the following comments:

Mr. Welch: Basically, this is a 13'x16' kickout on the back of the house for a master bathroom. It's really the only place we can go, but we did set it so it's not any closer to the south property line than what the existing house is, so it falls under the guidelines of an exception. I'd be happy to answer any questions.

A motion to approve Case 34-2018 – Teneca Clark/Owner – Request for an exception to the required side yard setback in accordance with the LDO, Section 16-

2-5.3(D) in an R-1 District for property commonly known as 9904 Sagamore Road – was made by Dunn; seconded by Munson. Motion carried with a unanimous vote of 6-0. For: Munson, Dr. Peppes, Hawk, Farrington, Dunn, and Bussing.

ELECTION OF OFFICERS

A motion to nominate Bill Clawson as Chairman was made by Dunn; seconded by Hawk. Motion carried with a unanimous vote of 6-0. For: Munson, Dr. Peppes, Hawk, Farrington, Dunn, and Bussing.

A motion to nominate Mel Hawk as Vice Chairman was made by Clawson; seconded by Dunn. Motion carried with a unanimous vote of 6-0. For: Munson, Dr. Peppes, Hawk, Farrington, Dunn, and Bussing.

A motion to nominate Wade Thompson as Secretary was made by Bussing; seconded by Dunn. Motion carried with a unanimous vote of 6-0. For: Munson, Dr. Peppes, Hawk, Farrington, Dunn, and Bussing.

MEETING ADJOURNED.